The Ethics of the Legal Profession

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MANY words in common use are hard to define. Even lexicographers fail in their task. Witness the early dictionary which defined, "CAT: a small domestic animal."

The word profession has, for many Anglo-Saxon generations, called up to mind medicine, theology, law. These have been called "the learned professions." Each of them, in respect of its members, imports training, the possession of certain qualifications (variously prescribed) and an ordination vow, a Hippocratic oath or an oath of office.

The state, of which a lawyer *ex virtute jurandi* becomes an officer, at least of its judicial branch, professes to the public that he possesses certain qualifications of learning which are capable of being ascertained by official bar examiners; and, in favored localities, he is also solemnly certified (as are also bartenders and chiropodists) as possessed of good character. The attorney himself professes to such of the community as may employ him (or call upon him for gratuitous service), that he has capacity to assert and defend their legal rights in the courts of justice, or to counsel them correctly as to their rights and liabilities in their business relations.

Law is a double profession. It has an objective and a subjective phase. In its subjective aspect it possesses a life of the spirit, a high and lofty ethic; higher than the gentleman's "noblesse oblige." It is equivalent to the ordination vow of a priest in the temple of Justice. It involves subjection to self-denying ordinances and domination by a spirit of unselfish service.

How far below such a plane are those who would make it, as well as call it, a business, a means of money-making or of political preferment alone?

In another connection the writer has outlined the threefold obligations of the lawyer[1] in dealing with the question of the status of this profession in our social economy, and shown that he has a triunity of duty: to his client, to the court and to the community.

Theory of the Universal Right to Practise Law

It is assumed even in the most recent analysis of the subject [2] that in a democracy everyone has a right to enter any profession, and that it is undemocratic to erect such barriers at

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[1] *See* Address in *Hubbard Course on Legal Ethics*, Albany Law School, 1905.

[2] *See* Bulletin Number Fifteen, Carnegie Foundation for the Advancement of Teaching, entitled, *Training for the Public Profession of the Law*, 1921, by Alfred Z. Reed, pp. 469. This bulletin is prepared by a layman. It shows painstaking labor. Its facts are ably marshaled. But it illustrates the inadequacies of the grasp of a professional problem by a non-professional mind. It has been well said by Mr. Ringrose: "The errors of men who are not familiar with the practical working of legal institutions will be errors of detail." The corollary is that "professional opinions often neglect first principles" since "the practice of an art is apt to obliterate from the mind the science on which its philosophy is founded." *The Inns of Court* (1910), Hyacinth Ringrose.

the gate as may prevent or deter the average man from entering activities which are so closely related to the political interests and life of our respective communities. To avoid this implication the author, Mr. A. Z. Reed, concludes that a unitary, that is, an undifferentiated, bar "not only cannot be made to work satisfactorily but cannot even be made to exist." He also concludes that adequate professional tests cannot be provided, to which all training schools shall conform, and agrees that there must be "types" of lawyers produced by "types" of legal education. We suppose that students would again become as in the Roman days "*studioni juris vel jurisprudentiae* (N.B. *vel* = or). They would either become mere practitioners, or rise to the foot hills of advocates or to the mountain tops of *jurisconsultus* or *jurisperitus*.

I do not believe it. There will always be *grades* of lawyers, but the English differentiation between barristers and solicitors is not one to be made here by statute, but by natural selection—and the profession, once awakened, will see to it that the right to enter it shall be so standardized as effectually to exclude from its privileges the "completely incompetent individuals" who, under our present haphazard and uncoördinated systems of bar examinations, can enter its priesthood in a state maintaining low standards and migrate, later, under our ridiculous rules of democratic comity, into the bar of a state having high standards.

At any rate, we have this theory of the universal right to practise law. It has even entered into the decisions of the highest tribunal of our country. The Supreme Court of the United States has observed, "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose." But the Court most wisely continues, "subject only to such restrictions as are imposed upon all persons of like age, sex and condition." [3] Fortunately, in many of our states certain intellectual standards and, in some, qualifications of character are erected and exacted to which the applicant for admission to this particular profession must conform. It is, after all, the personal equation that counts and it is the exceptional man who enters a learned profession. Theoretically, he should have a *vocation* to the law as he is expected to have to the ministry. As St. Paul said, "Woe is me if I preach not the Gospel," and the ideal lawyer should be under the similar constraint of an all-else-excluding vocation. Otherwise he will soon find his level. Mr. Wigmore had this in mind when he styled the profession a "priesthood of Justice." [4]

The exhaustive research into the history of the profession, into the nature and extent of its organization and the association of its members into bodies, more or less self-governing and intended to impact upon the community by collective action, embodied in Bulletin Number Fifteen above referred to, makes one regret that the superficial character of its conclusions, though based upon more or less adequate premises, warrants the stricture upon it in Dean Stone's elaborate analysis of that Bulletin. This is, broadly, to the effect that it seems to recognize that, while a first-class law school is requisite for the production of a first-class lawyer, a second-class law school has a *raison d'etre* in order to meet the *democratic need for second-class lawyers*. This reminds us of the farmer who cut in his barn door a large hole for the large cat and a small hole

[3] 129 U. S. 114.

[4] Introduction to *Ethics of the Legal Profession* by Orrin H. Carter, 1915.

for the kitten. If the only object is to give access to the barn, it would be more economical and make a better-looking door, if no cutting of holes was done at all, and the door was left open for cat and kitten alike. Either may, if occasion arise, be chased out by the owner of the barn.[5]

THE NATURE OF THE PROFESSION

The word "profession" has been defined substantially, again by the Supreme Court of the United States (and I venture to paraphrase its language), as a vocation involving relations to the affairs of others of such nature as to require for its proper conduct an equipment of learning or skill, or both, and to warrant the community in making restrictions in respect to its exercise.[6] And when such restrictions are embodied in statutes of the state, or in rules of court, and the appropriate authority certifies A to be a member of the bar of that particular state, it *holds him out*, as already hinted above, to the community as possessing the qualifications contemplated by the statute or by the rules.[7] On the other hand, any lawyer possessing a certificate to practise in the supreme court of his state, in a particular federal court, or in the Supreme Court of the United States, *holds himself out* as possessing qualifications of efficient service to those members of the community whom he is there to serve.

The fundamental, underlying element, therefore, of professional life is this idea of an efficient, skilled service. The assumption in Bulletin Number Fifteen that under our democratic institutions the right to enter any profession is an inalienable right, must be taken with a grain of the salt of commonsense. Our records are full of descriptions of the respect or lack of respect in which lawyers have been held in the beginnings of all democratic communities. The experience has been that the trial has been made over and over again of getting along without lawyers. They have even been prohibited by law. Our colonies were at the outset peculiarly the victims of this misconception and false theory. But it soon became obvious that not only must lawyers be recognized as important factors in the community, but that bad lawyers must be repressed and suppressed and, therefore, that standards must be erected to which all lawyers must conform.

At first an oath was deemed all-sufficient. It is a sad commentary upon the profession itself that it took a century before the American bar as a whole came to the consciousness of the fact that it must in addition to such oath, erect standards or canons of ethics; that it must publish those standards to the community at large, so that men could know, not only what they could expect of lawyers, but what lawyers were expecting of one another and what the courts could require of them. And it has taken nearly a generation since this formulation of canons was first mooted for the courts themselves to depart from the narrow precedents of former decisions, which tended to restrict their power over lawyers to penal lines (that is to say, lawyers were to be disbarred only if they had broken the statute of the state forbidding the doing of some particular thing). But now, judicial decisions, east and west, are beginning to embody recognition by the judges of the fact that when a member of the bar indulges in indecent solicitation of business, or undignified advertisement

[5] But *see* Mr. Reed's rejoinder, just published, American Bar Association *Journal*, February, 1922, *p.* 114.

[6] Paraphrased from *United States* v. *Laws*, 163 U. S. 258.

[7] *In re Bergeron* 220, Mass. 472.

of his wares, or in other breaches of our canons, the courts will assume that such a lawyer may be censured, suspended or disbarred for violation of the canons in force in the profession. We have, thank God, reached the stage when a lawyer must respect "the essential dignity of the profession" as well as the Mosaic Decalogue and the penal law of his state.

Nevertheless, the idea persists, and it is endorsed by men of high repute and standing (and this is very hard to understand), that *because* of our democratic institutions, and *because* of this "inalienable right" to practise law (if one can secure the necessary state certificate), and *because* the law is a social-service profession, then, since efficiency is the keynote of today, the law and its practice must be conducted on the basis of efficiency; that it is, after all, a business, and a money-making business, and that it would be idle for the lawyer to compete with other lawyers without the same prudent and diligent use of business methods, of "hustling," of advertising, price fixing, etc., which the ordinarily reasonable and active business man uses in the transaction of his business affairs.

Mr. Julius Henry Cohen rendered a great service to the profession by his book, *Is Law a Business or a Profession?* (1916, Banks Law Publishing Company), in which he has traced the preparedness for ethical standards and has discussed and tabulated data as to admissions and disbarments up to 1915 in the State of New York. (q.v.)

COMPENSATION FOR EXERCISE OF SKILL NOT TO BE REGULATED

Passing one step farther, it is obvious that members of a profession devoted to service and, under our institutions, entitled to compensation for such service, ought not, if we consider the liberty of the individual alone, to be regulated in respect to compensation for such service. It has been said by them of old time: "Thou shalt not muzzle the ox that treadeth out the straw," and, "The laborer is worthy of his hire." Yet this matter is a matter of common concern. Doctors have their scale of charges for office- or house-visits but surgeons, outside of occasional agitation of the subject, reserve the right to fix their own fees for special operations requiring a maximum of preparation, education, practice and skill. And so in the law, while as many lawyers render gratuitous service to poor clients as do physicians to needy patients, nevertheless, in small communities where everyone knows everyone else, it is not infrequent to find the establishment of a so-called "fee bill" or agreed regulation of minimum charges, so that no lawyer can undercut his competitors. The theory of this, however, remains that in proper cases and under special circumstances the individual lawyer is not to be limited to the minimum fixed by such tariff table.

These two elements, the profession of a given degree of skill and the right to charge for the exercise of that skill, underlie the obligation to the client and give rise to cause of action against the lawyer for malpractice; that is to say, upon demonstration of the fact that by reason of his not possessing the proper skill he has failed to perform his contract of efficient service to his client, whereby his client has been damaged, the lawyer may be held responsible for damages, as may the doctor for improper medical care or surgical treatment.

ORGANIZATIONS AMONG LAWYERS

Before discussing the nature and extent of the standards which the collective bar may promulgate as the

norms of conduct to which all its members must conform under penalty of exclusion from the privileges and dignities of professional life, just a word as to organizations of lawyers. It is impossible here to set forth the number and type of organizations and their jurisdiction of the standards for admission to membership, financial support, etc., throughout the forty-eight states of the Union.[8] Great detail in this respect is contained in Bulletin Number Fifteen, prepared with meticulous care over a period of eight years.[9] For the purpose of this survey it is sufficient to say that the American Bar Association, with a membership of 14,111 in August, 1921, represents in one sense the aristocracy of the American bar. It is, however, an aristocracy to which any lawyer of good standing may be admitted, regardless of his estate, because the dues are nominal, $6 a year. Its meetings are held once a year; most of its work is done by conferences of its sections or by committees devoting an enormous amount of *ad interim* time to the examination of problems that are referred to them, and, in spite of all the criticisms made upon this body as not being really representative of all the associations, it impacts upon the community in many decisive ways.

In three respects alone it has justified its existence:

First, in the activity of its Committee on Uniform State Laws.[10]

Second, in the very fact that it has promulgated canons of ethics which have been adopted by the bar associations of nearly all of our states.[11] The adoption of these canons by state and even by county bar associations, the printing of such canons and the exhibition of them in court houses and other public places for the information of the other members of the community; the recognition of such standards by the courts in disbarment proceedings, or in actions against lawyers for improper or negligent conduct, have spread the interest in ethical standards over the entire country, and, in particular, have resulted in the adoption of such canons by other organizations of professional men.

The *third* respect in which this Association has justified its existence has been in its convening at the time of its own meetings representatives of all the bar associations willing to send such delegates from the different states, thus forming a nexus between, or shall we say a clearing house for, the local and the national associations. Such combining of associations in the discussion and settlement of great questions has led, notably, for instance, to such gatherings as the Conference of Bar Association Delegates recently held in Washington, February 23–24, 1922, on the subject of "Legal Education," attended by nearly four hundred delegates, representing over one hundred bar associations, and presided over at its different sessions by the Chief Justice of the United States, and by Mr. Elihu Root (whose titles of eminence as a lawyer are numerically too many to be tabulated), the conclusions of which Conference have now become a matter

[8] *See* article by Mr. Harley, page 33.

[9] *See* Bulletin Number Fifteen, Carnegie Foundation for the Advancement of Teaching, entitled *Training for the Public Professor of the Law*, 1921. *Pp.* 57–111. *See* also the Sixteenth Annual Report of the Carnegie Foundation.

[10] *See* Report of that committee in *Year Book* of the Association for the last ten years, tabulating the number of uniform laws that have been adopted in the different states as a result of its agitation.

[11] *See Report of American Bar Association, Committee on Ethics*, 1920, referring to questionnaire to judges of all the courts, state and federal, issued by that committee.

of public knowledge, interest and record.[12]

MODIFICATIONS IN ADOPTION OF CANONS OF ETHICS

Nevertheless, here and there in the different associations the canons of the American Bar Association have seemed to be "counsels of perfection." In one respect or in another local associations have modified some particular canon. Some of them are reluctant to visit with the weight of displeasure, even to the extent of mere censure, one who "solicits business," or one who "advertises" in certain modified fashions. Others are hostile to the "contingent fee," however regulated. Thus the American bar as a whole lacks uniformity: (a) in respect to its standards as aforesaid; (b) in respect to their enforcement in disciplinary proceedings. In this second respect a contributing cause is the almost inexcusable mental attitude of many judges charged with the duty of disbarring. Witness, for example, the answer of a Kansas judge to the questionnaire issued by the Committee on Ethics of the American Bar Association to the different judges of the country, when asked as to disbarment proceedings in his court. He stated that there had been one case where a lawyer had embezzled the funds of his client and that the court had suspended proceedings "on condition that he should leave the state!" And then he added, "But I have since been informed that he has removed to Wichita, and is practising there."[13] Others, as above indicated, insist upon proof of violation of some penal statute before they will disbar a man; still others consider that mere restitution at the pistol point of disbarment proceedings to the complaining client should rehabilitate the man in the confidence of the profession, the bench, the client and the community.

We must add to this situation the attitude of the local associations, by which I mean the county bar associations, which, in an experience extending over a number of years in connection with the Committee on Grievances and the Committee on Legal Ethics of the American Bar Association, and like committees of the New York State Bar Association, I have found peculiarly unwilling to bring fellow members to the bar of justice. They will resort to great and laborious efforts at negotiation and settlement of the particular controversy that brings that man before them for discipline, and I might generalize by saying that in 90 per cent of the cases a liberal coat of whitewash is administered to the attorney complained of upon his agreeing "not to do it again." The confidence in the profession due to popular knowledge that it has canons of ethics is more than destroyed by the discovery that the canons are but *brutum fulmen*.

A notable exception to this situation must be recorded in the case of certain associations that have organized themselves for the purpose of keeping the local bar clean, and have appropriated liberal amounts to pay salaried attorneys who devote themselves especially to the task of receiving, sifting and, if necessary, presenting complaints to the appropriate court and securing the determination of that court. That has been peculiarly true in the case of the Association of the Bar of the City of New York, of the New York County Lawyers' Association, of the Kings County Bar Association in Brooklyn and of the Chicago Bar Association. Every reader can supplement this list,

[12] Readers interested in this, can write to Mr. Shippen Lewis, of the Philadelphia Bar, who was secretary of this conference.

[13] *See* also *Journal American Judicature Society*, June, 1920, on "Sanitation of the Bar in Pennsylvania."

or find exceptions to it from his knowledge of his own community.

THE BAR AND THE ELECTION OF JUDGES

To what extent does the local bar become active and exert a real and effective influence in the nomination and election of judges?

How perfectly true, in this connection, are the words of Emory Washburn in his famous lectures on "The Study and Practice of the Law," delivered at Harvard, that "the lawyer is not only a member of a profession but a member of the community." Yet the answers to the questionnaire (of the American Bar Association) revealed the fact that in most districts it is not considered "the thing" for the bar, as a collective body, "to butt into" politics, and it seems to be assumed that the furthest extent it is "dignified and proper" to go is to have committees appointed to examine into the qualifications of the nominees of the respective political parties, *after* they have been selected, and to report on their fitness for the bench. This is usually to act too late. It certainly would seem that the influence should be exerted farther back; that the bar is best fitted to judge as to what one of its members, or more, is qualified by education and temperament for the judicial office and, if need be, to force such nominations upon the local political organizations.

The fact remains that the reports made by committees on judicial nominations, even when given the publicity that they are by the press, in such a center, say, as New York City, fail to impact upon the consciousness of the large majority of voters, who do not read the papers in which these reports are given publicity and who would not pay much attention to them if they did. Allowing for differences of political conviction, opinion and affiliation, is it conceivable that the influence of two bar associations, having an aggregate membership of six or seven thousand out of the ten or twelve thousand lawyers in a particular political unit (if exerted directly upon *organizations*, that is, upon the persons who, after all, in spite of direct primary laws and various ballot reforms, control nominations in the various parties capable of electing a candidate), would be without its effect, and could fail to insure high standards in the qualifications of those nominated and elected to judicial office?

When one rereads that great argument of Rufus Choate, made before the Massachusetts Constitutional Convention, in which he argues for the appointment of judges as distinct from their election by popular vote, one has to marvel indeed at the high standards of dignity, impartiality and efficiency nevertheless manifested by the elective judiciary of our great municipal centers. In spite of petty grievances, disappointed litigants and charges of political sub-cellar influence, the cases of complaints against judges before bar associations or in impeachment proceedings are gratifyingly few, both in states where the judiciary is appointed and in those where it is a political office to be grasped at.

CLEANING THE AUGEAN STABLES

It is impossible to give a statistical survey of the number of trials and convictions for violation of ethical standards covering the various states of the Union. A tabulation of them would cover many pages and, in the character of the penalties imposed to distinguish illegal from immoral or unethical acts, would require a volume in itself. Anyone interested in any particular state has only to ask some legal friend to communicate with the grievance committee of that state's

bar association to secure such data. The fact is probably the same in all the states, that conviction of a penal offense operates to disbar a lawyer; that, nevertheless, it is usually necessary to inform the appropriate tribunal of the fact of his conviction and have his name stricken from the roll. The question has arisen from time to time whether a pardon for the offense automatically reinstates the attorney. In my opinion it does not, but application must be made for such reinstatement. If the offender so pardoned should practise without such formal reinstatement he is liable to further discipline and prosecution. The violation of penal laws without actual conviction is sufficient proof of obliquity of moral character to warrant any court in disbarring.

It is when we come to the finer shades of lack of ethical perception that grievance committees find difficulty sometimes in persuading the courts to act with sufficient firmness. In the appendix to this volume appear canons of ethics, not only of the American Bar Association but of the Commercial Law League of America. The path of the collection lawyer towards ethical purity has been an arduous climb. The trouble has been to differentiate between collection agencies and their attorneys. It has aroused vehement discussion of the propriety of the division of any professional fee with a layman, which has been criticized as affording a cloak whereby a lawyer, by incorporating a collection agency, can resort to means of solicitation of business in which the corporation, having no soul, is free to indulge, and from which he reaps the harvest or agrees to divide his fees in order to secure the employment.

A notable contribution to the welfare of the profession generally, and to this branch of it in particular, was made when the New York County Lawyers' Association, in a conference which lasted months, at which these practices were discussed with representatives of the "commercial lawyers," finally, in its notable answer to Question No. 47, laid down certain rules or principles governing the conduct of such attorneys.

Ignorance of ethical standards on the part of a very large number of members of the bar, whose business is small and of whose income collections afford the fundamental, was shown in the reports of one of the conferences of this Commercial Law League held at Atlantic City. One member, it seems, said he had heard so much about "ethics" at that meeting that he decided he would try to find out what it meant, so he asked his waiter at the Chalfonte, "Sam, do you know what this word 'ethics' means?" "I reckon I do," replied Sam. "What is it?" asked the inquiring member, and Sam said, "Just about the same as that word 'etiquette' which tells you there is certain things you mustn't do, *if anybody is looking.*"

This incident pitifully illustrates the absolute necessity of having bench and bar alike ingrained with the conviction that these standards of ethical conduct are norms to which all lawyers must conform, whether the lawyer is a general practitioner, a collection lawyer, a patent-lawyer, a negligence lawyer or a corporation lawyer. Specialization releases from no obligation. This is not to say, however, that every lawyer violating any canon must be disbarred. There are many cases where a lawyer through zeal or ignorance offends against the essential dignity of the profession but, being brought to book and censured, may be sufficiently shocked into appreciation of the standards to remain or become a useful member of the community.

EXTENSION OF IDEA OF OBLIGATION FOR PUBLIC SERVICE

Whatever the temporary criticism of the profession in popular estimation may be, the fact is that all really critical observers of our social conditions have recorded their conviction, as did De Tocqueville, when he said, for example, that the influence which members of the legal profession "exercise in the government is the most powerful existing security against the excesses of democracy." In another sentence he refers to the bar as the "most powerful if not the only counterpoise to the democratic element." A similar conviction is registered in the appeal which is made to the New York State Bar Association in support of an International Bar Association, organized in Japan by Dr. Rokuichiro Masujima, ex-President of that Association, Honorary Member of the New York State Bar Association, Barrister at Law of the Middle Temple, as well as an honored member of the Japanese bar. His contention is that the combined influence of lawyers all over the world, devoted to the principles of the common law, should be a guaranty in the human family that principles of common justice will through their influence leaven the political world.

St. Paul, in his great summary of the Christian martyrs, began his appendix with the words, "Time would fail me to tell of Barak,—and of Gideon," and, similarly, to call the roll of members of the American bar who have dominated the public affairs of our nation would be to make of this publication an encyclopaedia of names.

This fundamental idea of public service is expressed by Shakespeare himself in *As You Like It.* We all recall the line, "When labor sweats for *duty*, not for *meed.*"

In many of the lectures delivered on the Hubbard Foundation at the Albany Law School on the subject of "Legal Ethics," one distinguished speaker after another has emphasized the fact that the great lawyer is not the man who enters the profession as a means to acquire a fortune. He must enter it, as we have noted above, as a vocation, with the idea of rendering service. He must have the spirit of Lincoln as contrasted with the spirit of Webster, great advocate though he was; for even in the Girard Will case, when Webster could secure no present refresher or retainer, he exacted a contingent fee agreement.[14]

NEED FOR PROPAGANDA

Bearing these considerations in mind, there is no question but that there must be propaganda. When the canons of the American Bar Association had not yet been adopted by the Association, or, having been adopted, had not yet been endorsed or adopted by various state associations, there was a great deal of discussion and propaganda. In the City of New York lawyers interested in this matter not only conducted this propaganda in legal magazines and in the public prints but volunteered, and were actually appointed, to deliver addresses on the subject at various Y. M. C. A. centers, in the Phipps Settlement, in Cooper Union, and other public places under the general title of "What the Ordinary Citizen Is Entitled to Expect and Exact of His Lawyer in the Way of Fidelity, Honesty, Diligence, etc."

The late General Thomas H. Hubbard by gift in his lifetime established a lectureship or foundation at Albany Law School, to which every year one or more speakers of influence is appointed to indoctrinate the students of

[14] A copy of this was furnished by me to and published by the *New York Law Journal*, some years ago.

that particular school in respect to ethical standards. This example might well be followed in other schools. A determined effort has been made by committees of ethics in different states to see to it that either by persuasion or by the compulsion of rules of court, law schools expecting their certificate of graduation to be accepted by bar examiners as the equivalent of a clerkship or prescribed years of study, should prescribe and faithfully carry out a certain number of hours of lectures upon the subject of legal ethics. Dean Costigan endeavored to fill this need. He made an exhaustive examination of the sources of the standards or traditions showing the growth of the rules governing conduct becoming a member of the bar, and collated with that the answers to questions given out by the New York County Lawyers' Committee (the clinical reports of which have a circulation all over the world and have in but one or two instances occasioned adverse comment or complaint). This treatise [15] contains a most fascinating history of the entire subject. Obviously this matter is intimately and vitally connected with the nature of legal education. And it is surprising that those who come in contact with the eager youth who are looking forward to qualifying for this great social service, so often prove impatient of the suggestion that their teaching should have this moral side line, or of the more extreme requirement that the ethical viewpoint should underlie all their instruction as to the methods and practice of the law. One Dean replied to a letter from me in this regard that he had no cure for souls. What a pedagogic heresy! Every teacher has the fashioning or at least the polishing of a soul.

[15] *Cases on Legal Ethics* in the American Case Book Series, 1917, West Publishing Co.

In order to summarize this discussion the following is submitted as a redaction to fundamental principles of the thirty-two canons of the American Bar Association:

A DECALOGUE OF THE PROFESSIONAL OBLIGATIONS OF THE LAWYER

(1) As an officer sworn to uphold the Constitution and to the proper enforcement of the law, the lawyer should by his conduct and counsel exemplify the law-abiding spirit and refrain even in his private life from anything contrary to the spirit of the moral and statute law.

(2) In his relation to the courts, the lawyer should in his conduct maintain their dignity by respectful address, by punctilious discharge of all forensic duty, and by abstaining from all attempts to curry favor, or from the appearance even of using personal relations to secure professional advantage.

(3) In his relations to clients, the lawyer's duty arises from the confidence reposed in his learning or ability; for which he is to be paid. Therefore:

(a) In the conduct of unlitigated business he owes a scrupulous fidelity to the client's highest interest and must seek no advantage or profit to himself outside of his reasonable compensation.

(b) In advising litigation he must be guided by his own (or counsel's) judgment of the law applicable to the points in issue. He should never countenance by acceptance of a retainer unjust, useless or oppressive suits, or consent to the interposition of merely dilatory, false, or sham defenses.

(c) In actual litigation, he may use all procedure provided by law appropriate to the protection of

his client's interests; he must be alert and diligent in prosecution; vigilant and careful in defense; refrain from any attempt to deceive a court or jury; be courteous to his fellow lawyers, and obliging in matters not inconsistent with his client's rights.

(4) The lawyer must not violate his client's confidence unless, in a proper case, compelled so to do under oath. He must not use knowledge so gained to his client's undoing or disadvantage and, if entrusted with money or property, he is in the highest degree a trustee and liable professionally for any failure to administer the trust reposed in him with scrupulous fidelity and capacity.

(5) The lawyer is always entitled to his reasonable compensation; this may be contracted for with the client provided no advantage be taken of his ignorance or necessities. Contingent fees, where not unconscionable in amount, are proper if the client desire such form of compensation. But in all cases he must avoid even the appearance of champerty or maintenance.

(6) A lawyer employed for or assigned to the defense of one accused of crime is, even though apprised of his guilt, bound by his duty to ensure a fair trial and to prevent conviction save pursuant to the law in that case made and provided.

(7) The lawyer should not solicit, or permit others to solicit for him, any professional employment. No division of fees or agreement therefor is proper except with fellow lawyers based on a division of service. Self-advertisement is commercial in spirit and tends to lower the sense of professional dignity.

(8) In his relation to the community of which he is a citizen the lawyer occupies a position of peculiar responsibility. His respect for the law and the courts in which it should be administered should make him fearless to expose and attack any breach of judicial integrity. So also he must be vigilant to assist in purging the bar of unworthy members. He should be quick to attack any abuse of process of law or any invasion of the rights to life and liberty guaranteed to all by the Constitution.

(9) If invested with public office he is bound to a higher efficiency of service by reason of his knowledge of the law. If he serves as a District Attorney he represents the people of the state. He is sworn to enforce the law but cannot stoop to oppression or injustice—such as the suppression of evidence or the secreting of witnesses who might tend to establish the innocence of one he is prosecuting.

(10) If elevated to the bench his obligations become intensified. In the discharge of his judicial duties he should be studious, patient, thorough, punctual, just and impartial, courteous and fearless, regardless of public clamor or private influence.

CANONS OF JUDICIAL ETHICS

Since judges are, under our form of government, a part of the governmental power, and sworn to uphold the Constitution, and chosen to interpret, apply and enforce existing laws, it is clear that their ethical obligations are greater than those of their brethren at the bar, from whom they have been thus set apart.

These latter have a primary duty to a client opposed to the client of another in interest, and this duty modifies at times their duties to the court and to the community.

A committee of the American Bar Association, recently appointed, of which the Chief Justice of the United States, it is believed, is to be the chairman, are to engage in the task of

formulating canons for the judiciary.[16]

That task will require time for its performance.

For the purposes of this symposium, however, the following may be proffered as a nucleus for elaboration.

A PROPOSAL FOR AN ETHICAL DECALOGUE FOR JUDICIARY

I. Having sworn to uphold the Constitution and being charged with the solemn task of administering justice among his fellow citizens under the law, the judge should be *juris peritus*, learned in the letter and spirit of the Constitution and of the statutes enacted in conformity therewith—and should keep himself constantly informed and in touch with the social development of the community he is to serve, in order that he may adequately apply that learning to the varying needs that emerge in the controversies submitted to him for arbitrament.

II. To learning he must add impartiality. "He must not respect persons in judgment." In holding the scales of Justice he must not allow personal or political hostility, on the one hand, or friendships or prejudice, on the other, to weigh in either balance. Whether the parties before him are friends or foes, or whether they be known to him or unknown, he must be blind to considerations other than those constituting or arising from their respective rights or obligations under the law.

III. Whatever the degree of his learning, and impartiality, he must in the highest degree possess and preserve a character free of reproach. Himself a priest in the Temple of Justice, he must scrupulously observe the moralities and obey the laws as a citizen, and not arrogate to himself any right to be above them or free from their common operation.

IV. His judicial character presupposes absolute integrity. He should be honest in his personal dealings, and must not put himself under pecuniary obligations before his election, or subsequently, to those who may appear before his court.

His service is a self-denying ordinance, and he should abstain from even the appearance of the evil of profiting by information secured *ex virtute officii* to speculate or invest on the strength of his knowledge thus acquired.

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[16] Since writing this article, the author has received a letter from Mr. Charles A. Boston, Chairman of the Committee on Professional Ethics of the New York County Lawyers' Association, the following excerpts of which will be of interest to the general reader.

"In response to your recent request that I contribute something to the forthcoming number of the *Annals* of the American Academy of Political and Social Science, it seems to me that any contribution by me at this time, other than is contained in this letter, would be premature, because the subject of the formulation of Canons of Judicial Ethics by the American Bar Association, to supplement the Canons of Ethics approved by it in 1908, has been referred by the Executive Committee of that Association to a Special Committee which will take the matter under consideration, and I do not feel that I can properly anticipate the action of that Committee.

"I was recently advised by the President of the American Bar Association that he had designated for membership on the Committee Chief Justice Taft, ex-Senator George Sutherland of Utah, and myself, and that two vacancies remained to be filled from members of the judiciary.

"I do not think it amiss, however, to say that Mr. Everett V. Abbot of this City, and myself, jointly contributed an article on 'The Judiciary and the Administration of the Law' to the *American Law Review* for July-August, 1911, from which I quote the following suggestions in respect to Canons of Judicial Ethics:

" 'They should clearly and concisely make it known that the judge should so administer the law in the settlement of controversies as to show that he appreciates his position as honorable of itself and honorably to be maintained; that his conduct should uniformly be that of a gentleman and an officer and for the good of the service; that he should be ever conscious of his responsibilities, attentive to his duties,

"He shall do everything for justice, nothing for himself."[17]

V. Whether his office be appointive or elective, he should not be swayed in judgment by hopes or fears regarding the continuity of his official service.

In making appointments in aid of the administration of justice, such as appointments of receivers, referees, special guardians, appraisers and the like, he must, on the one hand, avoid nepotism and, on the other, not surrender his duty of selection to any political or other dictator. Those whom he selects act in his place and stead, in relieving his judicial time, and he is responsible for their integrity, fidelity and industry, as for his own.

VI. Charged with the duty of acting as a check in the interests of the people against aggressions or usurpations of power by either executive or legislative branches of the government, he should be fearless to assert his power irrespective of the apprehended effect of antagonisms, and hostilities thus engendered. But here also he must be impartial and sustain if need be these coequal agencies of government, in the proper use of powers constitutionally bestowed upon either.

VII. He must not allow his judgment to be swayed by the magnitude or smallness of the litigant's interest, or by the insignificance or prominence of his advocate. Intent on ascertaining the truth and reaching an adequate and just decision, he must not fear to protect a party before him from the ignorance or negligence of his own attorney, or neglect adequately to guide and instruct juries in the exercise of their peculiar functions.

VIII. He must wear the ermine with dignity. As the incarnation of justice, he must, when discharging his judicial functions, be free from temper, though he may indulge in righteous indignation if perjury be attempted by witnesses, or if counsel seek to deceive or mislead the court or jury.

He owes to the people, punctuality, at whatever cost of personal inconvenience, calmness, patience and forbearance, lest he be diverted from the issues to be resolved—courtesy to all before him—alertness to testimony and argument, since inattention is the highest discourtesy, is a thief of time and an earmark of inefficiency.

He must cultivate a capacity for quick decision. Habits of indecision must be sedulously overcome. He must not delay by slothfulness of mind or body, the judgment to which a party is entitled.

IX. To be learned, to be honest, to be fair and to be no respecter of persons is still not enough. *He must be believed such*, and so possess the perfect confidence of the community. In such case he may preserve and enjoy his personal intimacies and friendships unimpaired. He may achieve the affection of the bar and the respect of the public, and enjoy that loving veneration which the "Book of Job" records as the meed of the upright judge.

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assiduous in their performance, and avoid delay as far as possible; that he should be scrupulous to free himself from all improper influences and from all appearance of being improperly or corruptly influenced; that he should be studiously regardful of the rights of litigants; that he should be an independent and representative citizen, rather than a partisan; that he should use the necessary patronage of his office as a public trust, and that in the selection of referees, receivers, or other judicial appointees he should conscientiously appoint only men known to him to be of integrity and fitness for the duty assigned; and if he is permitted to practice at the bar, or to prosecute private business, he should not permit such matters to interfere with the prompt and proper performance of his judicial duties.' "

[17] Rufus Choates added to the quoted words: "Nothing for his friend, nothing for his patron, *nothing for his sovereign.*"

X. None the less is he a citizen, and bound to share the common burden of responsibility for the purity of the common weal.

He must not shirk a proper performance of such duties nor hide behind the judicial gown in times of revolt against oppression or corruption or in crises of social change. His life must be personally, politically and judicially *teres atque rotundus.*

CONCLUSIONS

In that remarkable book seeking to voice the desire of England for a higher and more spiritualized life, the author of *The Glass of Fashion* has embodied that ideal which must permeate every profession that identifies the moralities of that profession with the very character of the being of the man who professes it. His illustration of the expectation of honesty from those who serve him, by even a Bolshevik of the most criminal type, illustrates the fundamental idea of what the community expects of a man of character, and no man has a right, even in a democracy, to belong to a learned or skilled profession who has not the fundamentals of high character which may be expected to develop into fullness by the very experiences of his service.

What conclusions are we to draw?

I. That, in any democracy, whether loosely organized or highly articulated, public servants must, in theory, be controlled by lofty standards of duty.

II. That the people are entitled to know what those standards are, *and where there are none, to prescribe them.*

III. That conformity to those standards must be enforceable in a proper tribunal.

IV. *That it is to the highest interest of the profession itself* that every case of violation of its ethical standards be investigated and all offenders dealt with "lest the *res publica* suffer."

V. That the courts, when unspurred by a bar of high ideals, have failed adequately to regulate professional conduct, and therefore the bar must be so organized as to be self-disciplinary. And this even at the risk of appearing to become an aristocracy, or an undemocratic guild.

VI. That judges, as well as lawyers, are to conform their conduct to even more exacting ethical standards.

The Need for Standards of Ethics for Judges

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LEGAL ethics is defined in Rawle's third revision of Bouvier's *Law Dictionary* as follows: "That branch of moral science which treats of the duties which a member of the legal profession owes to the public, to the court, to his professional brethren, and to his client." On the subject of judicial ethics there is much confusion, by reason of the fact that a judge occupies a dual position. He is, first, a judicial officer of the state or of the United States; and, second, in most cases, a member of the legal profession. It is not at all essential, however, that a judge should be a member of the legal profession and his membership in that profession is, therefore, an absolutely distinct thing from his judicial office. The highest court in England, the House of Lords, in its original form was composed principally of lay peers. The present House of Lords in its judicial capacity is